of the word. The reference to shares is critical. Possession and control has nothing to do with shares as one can have possession and full control of a ship without any shares therein. Beneficial use must be distinguished from beneficial ownership. A demise charterer can have the beneficial use of the ship but he does not have the beneficial ownership as respects all the shares in the ship. I have no doubt at all that the words "beneficially owned as respects all the shares therein" clearly indicate equitable ownership and cannot by any means cover cases of possession and control without ownership. As Pertamina were not the equitable owners of the "Permina 1017", the plaintiffs had no right to seize it for non-payment of instalments by Pertamina under a time charter/hire purchase agreement in respect of "Noga". The defendants' application was therefore allowed.

Application allowed.

Solicitors: *Selvadurai & Emmanuel; Rodyk & Davidson; Donaldson & Burkinshaw; Drew & Napier.*

MALAYSIAN REPORTS

LOH KOOI CHOON v. GOVERNMENT OF MALAYSIA

[F.C. (Ali, Raja Azlan Shah and Wan Suleiman F.JJ.) June 7, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 157 of 1975]

Constitutional Law — Fundamental liberties — Liberty of person — Amendment of Constitution with retrospective effect — Whether valid — Restrictive Residence Enactment (F.M.S. Cap. 39) — Federal Constitution, Articles 5, 7 and 159.

In this case the appellant had been arrested and detained under a warrant issued under the provisions of the Restricted Residence Enactment. The appellant had not been produced before a Magistrate within twenty-four hours of his arrest. He claimed damages but it was held that no action could be brought against the police officer as he was acting in compliance with a warrant issued by a competent authority. The appellant appealed but before the appeal was heard the Federal Constitution was amended by Act A354/76 which provided in effect that Article 5(4) of the Constitution shall not apply to the arrest or detention of any person under the existing law relating to restricted residence and that this amendment shall have effect from Merdeka Day. It was argued that the amendment was unconstitutional.

Held: (1) Parliament can alter the entrenched provisions of Article 5(4) to remove the provision relating to the production before a Magistrate of any arrested person under the Restricted Residence Enactment as long as the process of constitutional amendment as laid down in Article 159(3) is complied with. When that is done it becomes an integral part of the Constitution; it is the supreme law, and accordingly it cannot be said to be at variance with itself;

(2) if Parliament retrospectively affects vested rights or pending proceedings, then it would be the duty of an appellate court to apply the law prevailing on the date of appeal before it. Subject to the constitutional limitation of Article 7 of the Constitution, to wit, protection against retrospective criminal laws and repeated trials, Parliament would be within the ambit of its competence if it deems fit to legislate retrospectively.

[Editorial Note: In view of the demise of Ali F.J. the court asked both counsel for the parties under section 42 of the Courts of Judicature Act, 1964 whether they consented to accept judgments by the remaining judges of the court, it being understood that if there was no majority opinion the proceedings should be re-heard. Both counsel consented.]

Cases referred to:-

(1) *Vacher & Sons Ltd.* v. *London Society of Compositors* [1913] A.C. 107, 118.

(2) *Henry* v. *Geopresco International Ltd.* [1975] 2 All E.R. 702, 718.

(3) *Assa Singh* v. *Mentri Besar, Johore* [1969] 2 M.L.J. 30.

(4) *I.C. Golak Nath & Ors.* v. *State of Punjab & Ors.* [1967] 2 S.C.R. 762.

(5) *Sri Sankari Prasad Singh Deo* v. *Union of India and State of Bihar* [1952] S.C.R. 89.

(6) *Sajjan Singh* v. *State of Rajasthan* [1965] 1 S.CR.. 933.

(7) *Kasavananda Bharati* v. *State of Kerala* [1973] S.C.R. Supp. 1.

(8) *Adegbenro* v. *Akintola & Anor.* [1963] 3 All E.R. 544, 551.

(9) *Hinds* v. *The Queen* [1976] 2 W.L.R. 366, 373.

(10) *In re Pulborough School Board, Bourke* v. *Nutt* [1894] 1 Q.B. 725, 737.

(11) *Barber* v. *Pigden* [1937] 1 K.B. 664, 673.

(12) *Letang* v. *Cooper* [1964] 2 All E.R. 929, 933.

(13) *Latikiro of Buganda* v. *A.G.* [1960] 3 All E.R. 849, 851.

(14) *Black Clanson* v. *Papierwerke* [1975] 1 All E.R. 810, 815.

FEDERAL COURT.

Raja Abdul Aziz Addruse (*Dr. Yaacob Hussain Merican* with him) for the appellant.

Lim Beng Choon (Senior Federal Counsel) for the respondent.

Raja Azlan Shah F.J.: It is clear that the question at issue is fraught with political controversy. No doubt the appellant and other persons hold strong views one way or the other on the justice of the impugned Act. I should add that right now no feature of our system of government has caused so much discussion, received so much criticism, and been so frequently misunderstood, than the duties assigned to the courts and the functions which they discharge in guarding the Constitution. For that reason and also because it is rarely that this court is faced with a constitutional question of this kind it is desirable at the outset to make clear the functions of the courts.

The question whether the impugned Act is "harsh and unjust" is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd.* v. *London Society of Compositors*[1]:

"Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature."

It is the province of the courts to expound the law and "the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction" — per Roskill L.J. in *Henry* v. *Geopresco International Ltd.*[2] Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature, and not the courts; they have their remedy at the ballot box.

The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying 3 basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.

Clause (4) of Article 5 of the Constitution prescribes that a person arrested must be taken before a magistrate within 24 hours so that an independent authority exercising judicial powers may without delay apply its mind to his case. This safeguard is to a large extent covered by the provisions of the Criminal Procedure Code but its incorporation in the Constitution is deemed essential for assuring the minorities that their rights would be constitutionally guaranteed and that they shall not entertain any apprehension of the alleged despotism and arbitrariness of the majority and legislative omnipotence. This safeguard equally applies to any person arrested under the Restricted Residence Enactment (Cap. 39) (see *Assa Singh* v. *Mentri Besar, Johore*)[3] "but evidently difficulties have arisen in the practical application of the enactment and hence the need for the amendment." (see [1976] 2 M.L.J. xcii).

The question is how safe are the provisions in clause (4) of Article 5 from change. This question arose in a case which the Supreme Court in India in *I.C. Golak Nath & Ors.* v. *State of Punjab & Ors.*[4] considered *en banc*. The same question had arisen twice before in India. On the first occasion in *Sri Sankari Prasad Singh Deo* v. *Union of India and State of Bihar*[5] the Supreme Court considered the validity of the Constitution First Amendment Act in 1950. One of the arguments against the validity of the amendment was that the power of amendment granted by the Constitution to Parliament did not extend to the abridgment or removal of any of the fundamental rights because such a law would be hit by Article 13 and void. This argument was not accepted. On the second occasion in *Sajjan Singh* v. *State of Rajasthan*[6] the Seventeenth Amendment was challenged but this argument, though faintly argued, was not accepted by three judges who constituted the majority. In *Golak Nath, supra,* another challenge to the same amendment was made and succeeded. By a bare majority of 6:5 it was held that the powers of amendment did not extend to the taking away and abridging of the fundamental rights on the basis that there was no distinction between the Constitution and ordinary law. An Indian writer* has aptly summarised the *Golak Nath* constitutional crisis as an intellectual crisis in reality. He said:

"It does not seem to be a rash hypothesis that if any one around there could successfully state the distinction between the constitution and ordinary law in clear juridical terms at least one judge would have deserted the company of the majority and the power of Parliament to amend the fundamental rights would not have remained eclipsed for six long years. . . ."

Six years later the Supreme Court in *Kasavananda Bharati* v. *State of Kerala*[7] had no difficulty in overruling *Golak Nath* practically without any dissent.

Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that

* *Tripathi* on 'Amending The Constitution'.

is to be interpreted and applied, and this wording "can never be overridden by the extraneous principles of other Constitutions" — see *Adegbenro* v. *Akintola & Anor.*[8] Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.

Counsel for the appellant before us urged that any amendment affecting the fundamentality of the Constitution should be avoided at all costs. According to him that part of the Constitution must not be touched. In my view, a distinction must be made between those parts of the Constitution which the framers thought should not suffer change and those that can be changed.

Our Constitution prescribes four different methods for amendment of the different provisions of the Constitution:

(1) Some parts of the Constitution can be amended by a simple majority in both Houses of Parliament such as that required for the passing of any ordinary law. They are enumerated in clause (4) of Article 159, and are specifically excluded from the purview of Article 159;

(2) The amending clause (5) of Article 159 which requires a two-thirds majority in both Houses of Parliament and the consent of the Conference of Rulers;

(3) The amending clause (2) of Article 161E which is of special interest to East Malaysia and which requires a two-thirds majority in both Houses of Parliament and the consent of the Governor of the East Malaysian State in question;

(4) The amending clause (3) of Article 159 which requires a majority of two-thirds in both Houses of Parliament.

(For a detailed study of the subject, reference may be made to Tun Suffian, *An Introduction to the Constitution of Malaysia*, 2nd edition, Chapter 21).

It is therefore plain that the framers of our Constitution prudently realised that future context of things and experience would need a change in the Constitution, and they, accordingly, armed Parliament with "power of formal amendment". They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country's growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A Constitution has to work not only in the environment in which it was drafted but also centuries later. "The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation or property in the generations which are to follow.... It is the living, and not the dead, that are to be accommodated." (*Thomas Paine*, Rights of Man).

As fundamental rights are not the same as ordinary rights, they can only be suspended or abridged in the special manner provided for it in the Constitution. In my opinion, the purpose of enacting a written Constitution is partly to entrench the most important constitutional provisions against repeal and amendment in any way other than by a specially prescribed procedure. Their Lordships of the Privy Council in *Hinds* v. *The Queen*[9] took the view that constitutions based on the Westminster model, in particular the provisions dealing with fundamental rights, form part of the substantive law of the state and until amended by whatever special procedure is laid down in the constitution for this purpose, impose a fetter upon the exercise by the legislature of the plenitude of its legislative power. A passage from the speech of Lord Diplock who delivered the majority judgment is apposite (page 374):

> "One final general observation: where, as in the instant case, a constitution on the Westminster model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the Parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the peoples themselves. The purpose served by this machinery for 'entrenchment' is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution, should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws. So in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision."

The framers of our Constitution have incorporated fundamental rights in Part II thereof and made them inviolable by ordinary legislation. Unless there is a clear intention to the contrary, it is difficult to visualise that they also intended to make those rights inviolable by constitutional amendment. Had it been intended to save those rights from the operation of clause (3) of Article 159, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. I am inclined to think that they must have had in mind what is of more frequent occurrence, that is, invasion of fundamental rights by the legislative and executive organs of the State by means of laws, rules and regulations made in exercise of legislative power and not the abridgment of such rights by amendment of the Constitution itself in exercise of the power of constitutional amendment. That power, though it has been entrusted to Parliament, has been so hedged about with restrictions that its exercise can only be made after "mature consideration by Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws."

There have also been strong arguments in support of a doctrine of implied restrictions on the power of constitutional amendment. A short answer to the fallacy of this doctrine is that it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power.

I concede that Parliament can alter the entrenched provisions of clause (4) of Article 5, to wit, removing the provision relating to production before the magistrate of any arrested person under the Restricted Residence Enactment as long as the process of constitutional amendment as laid down in clause (3) of Article 159 is complied with. When that is done it becomes an integral part of the Constitution, it is the supreme law, and accordingly it cannot be said to be at variance with itself. A passage from the Privy Council judgment in *Hinds* v. *The Queen*, *supra*, is of some assistance (page 392):

"That the Parliament of Jamaica has power to create a court ... is not open to doubt, but if any of the provisions doing so conflict with the Constitution in its present form, then it could only do so effectively if the Constitution was first amended so as to secure that there ceased to be any inconsistency between the provisions and the Constitution...."

This reasoning, in my view, is based on the premise that the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself. It is the supreme law because it settles the norms of corporate behaviour and the principle of good government. This is so because the Federation of Malaya, and later, Malaysia, began with the acceptance of the Constitution by the nine Malay States and the former Settlements of Penang and Melaka, by the acceptance of it by Sabah and Sarawak that entered the Federation in 1963, as "the supreme law of the Federation...." (clause 1 of Article 4). It is thus the most vital working document which we created and possess. If it is urged that the Constitution is on the same level with ordinary law, then the Constitution is an absurd attempt on the part of the framers, to limit a power, in its own nature illimitable. In the context of clause (1) of Article 160, "law" must be taken to mean law made in exercise of ordinary legislative power and not made in exercise of the power of constitutional amendment under clause (3) of Article 159, with the result that clause (1) of Article 4 does not affect amendments made under clause (3) of Article 159.

In conclusion, I hold that clause (4) of Article 5 is nothing but a constitutional protection which can be taken away or abridged only in the manner in which the Constitution provides. There is a world of difference between legislative immunity and a constitutional guarantee. The Constitution, by its very nature, creates the distinction. A constitutional guarantee cannot be wiped out by a simple legislative process as opposed to constitutional amendment.

Can an amendment of a clause in the Constitution operate with retrospective effect? It was strenuously contended for the appellant that a law which takes away vested right must be presumed to be intended not to operate retrospectively for the simple reason that subsequent change in the law would not prejudice such right. I accept this statement, for which authority is to be found in many cases. But my decision is based on the language of section 4 of the Constitution (Amendment) Act, 1976 (Act A354) which reads:

"Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day."

In so far as an Act of Parliament is concerned, the rule of construction is that in order to determine whether it is retrospective in its operation, the language of the Act itself must be looked into bearing in mind that an Act is not to be construed retrospectively unless it is clear that such was the intention of Parliament. If such was the intention that the Act was to be given retrospective effect even in respect of substantive right or pending proceeding, the courts have no alternative but to give effect to the Act even though the consequences might appear harsh and unjust.

The principle that parties are to be governed by the law in force on the date when an action is instituted and any subsequent amendment or alteration cannot affect vested right or pending proceeding, must always be read subject to the corollary that Parliament can always expressly provide that vested right or pending proceeding be affected by the amendment of the law.

If Parliament retrospectively affects vested right or pending proceeding, then it would be the duty of an appellate court to apply the law prevailing on the date of appeal before it. There is abundant authority for the proposition that an appellate court is entitled to take into consideration facts and events which have come into existence since the judgment under appeal was delivered: see *In re Pulborough School Board*, *Bourke* v. *Hutt*[10] and *Barber* v. *Pigden*.[11]

It cannot be gainsaid that Parliament is endowed with plenary powers of legislation and that it is within the ambit of its competence to legislate with prospective or retrospective effect. Retrospective legislation is one of the incidents of plenary legislative powers and as such is not required to be spelt out in the Constitution. Subject to the constitutional limitation of Article 7 of the Constitution, to wit, protection against retrospective criminal laws and repeated trials, Parliament would be within the ambit of its competence if it deems fit to legislate retrospectively. There is no such restriction of legislative power with regard to restrictive residence. In the absence of any constitutional provision against retrospective legislation with regard to restrictive residence it is not right to argue that Parliament should apply such a restriction. "The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it" — per Frankfurter J.

The appeal is dismissed. No order as to costs.

Wan Suleiman F.J.: The appellant was the plaintiff in High Court K.L. Civil Suit No. 729 of 1973.

By a Summons-in-Chambers under Order 25 rule 2 of the Rules of the Supreme Court the following points of law raised in the defence of the respondent/defendant came up for determination before the trial: —

(a) whether the arrest of the plaintiff by the defendant or its agents or servants on the 19th day of September, 1972 and subsequent detention of the plaintiff without him being produced before a magistrate within 24 hours is lawful by reason only of the validity of the warrant issued by the Minister of Home Affairs dated 13th day of September, 1972 under which the plaintiff was arrested, taking into account the provisions of section 32 of the Police Act No. 41 of 1967 and section 27 of the Prisons Ordinance No. 81 of 1952 and read with section 6 and/or section 39 of the Government Proceedings Ordinance, 1956; and

(b) whether the plaintiff's claim is bad in law by reason only of the failure on the part of the plaintiff to cite the servant and/or the agent of the defendant in his Statement of Claim.

The agreed facts of the case as set out in the judgment of the learned trial judge are as follows: —

On or about September 19, 1972, the Government of Malaysia by its servants or agents arrested the plaintiff under the authority of a Warrant of Arrest and Detention issued pursuant to the provisions of the Restricted Residence Enactment (F.M.S. Cap. 39) and thereafter detained the plaintiff at the Alor Star prison. On November 21 the same year, the plaintiff caused to be made to the High Court at Alor Star an application for an order that a Writ of *Habeas Corpus ad Subjiciendum* be issued directing the commissioner of Prisons, Malaysia, to have the plaintiff's body produced before the said court or, alternatively, for an order that the said Commissioner to show cause as to why the plaintiff should not be set at liberty. The documents pertaining to the said application were served on the said Commissioner of Prisons and on the Minister of Home Affairs on or about November 24, 1972. Before the application was set for hearing, i.e. on November 29, 1972, the plaintiff was released and allowed to return to his house at about 9.00 a.m. However, at about 4.00 p.m. on the same day, the plaintiff was re-arrested under a fresh Warrant of Arrest and Detention issued by the Minister of Home Affairs. The plaintiff accordingly claims damages against the defendant for wrongful imprisonment or detention from September 19 to November 29, 1972. He also claims for exemplary damages in respect of the second arrest and detention.

The learned trial judge held on the first issue, that since the omission on the part of the Police Officer and the Prison Officer in not producing the plaintiff before a magistrate within 24 hours of his arrest was an act in compliance with a warrant issued by a competent authority, they are protected from liability in tort by section 32(1) of the Police Act, 1967 and section 27 of the Prisons Ordinance, 1952. In consequence his Lordship held that no proceedings for damages against them personally can be maintained, so that the defendant in Civil Suit No. 729 of 1973 i.e. the Government of Malaysia is also protected from being sued by virtue of section 6(1) of the Government Proceedings Ordinance, 1956 read in conjunction with section 39 of the same Ordinance.

On the second issue his Lordship held for the reasons given in his judgment that the Statement of Claim was not bad in law.

The appellant/plaintiff was ordered to pay costs of the application. The hearing before the learned judge was on October 17, 1975 and judgment delivered the following day.

In the memorandum of appeal, learned counsel for the appellant relied largely on the decision of this court in *Assa Singh* v. *Mentri Besar, Johore.*[3] In that case this court held that though the Restricted Residence Enactment authorising the detention and/or the deprivation of liberty of movement of the subject did not have provisions similar to those in clauses (3) and (4) of Article 5 of the Constitution, this did not make it unconstitutional; and that despite such inconsistency with the Constitution, the Enactment was in force, but it must be applied with such adaptations as might be necessary to bring it into accord with the Constitution. It was also held that the provisions of clauses (3) and (4) of Article 5 of the Constitution should be read into the provisions of the Enactment.

The memorandum of appeal was filed on or about the 24th of June, 1976. However, with effect from August 27, 1976 Act A354/76 made the following amendment to Article 5(4) of the Constitution by adding this proviso to that clause: —

"Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day."

The result of this amendment if valid would be to reverse with retrospective effect the decision in *Assa Singh's* case.

Raja Abdul Aziz for the appellant submitted that the overall effect of the old Article 5 would have opened Government to a suit for wrongful imprisonment in this case, but the retrospective operation of the amendment if validly made would be to give Government complete protection.

The preliminary point therefore taken by learned counsel was — Is this amendment A354/76 constitutional? Raja Abdul Aziz's submission is briefly this:

Under Article 159, the Constitution may be amended by federal law. A law passed to amend the Constitution is law within the meaning of the term "law" in Article 4 of the Constitution, that unlike the Indian Constitution, because of the manner in which the Indian Article 383 is worded, there is no distinction between a law passed under our Article 159 and a law passed under any other Article of our Constitution.

Article 13(1) of the Indian Constitution reads:

"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, (i.e. Part III 'Fundamental Liberties') shall, to the extent of such inconsistency, be void."

Article 13(2) provides that any future law enacted by any authority in India which takes away or abridges

rights conferred by Part III and any provision thereof shall be void to the extent of such contravention.

The definition of law in Article 13(3), though it includes both the ordinary legislative power of Parliament and such other matters as customs and usages, does not include a law amending the Constitution which is placed on an independent footing under Article 368. (See *Basu's* Commentary on the Constitution of India, 5th Ed. Vol. 1).

It has been held that the Indian Parliament is competent to make amendments in derogation of fundamental rights by an amending Act in conformity with the requirements of Article 368.[5] (See also *Kesavananda Bharati* v. *State of Kerala*[7]).

In this country, Federal law, he points out, includes (under Article 160) any Act of Parliament. A law passed under Article 159 would have to follow the same legislative procedure as is prescribed in Article 66, like any other Act of Parliament, before it becomes Federal law. He arrives at the conclusion that the power under Article 159, though seemingly wide, is in truth non-existent since any law passed to amend the Constitution must inevitably be inconsistent with the Constitution, and must therefore because of Article 4, be void.

He then referred to three decisions: *Letang* v. *Cooper*,[4] *Latikiro of Buganda* v. *A.G.*[5] and *Black Clauson* v. *Papierwerke*[6] as aids to construction best summed up in the headnote to the last mentioned authority thus:

"Where there is an ambiguity in a statute the court may have regard to the report of a Committee presented to Parliament containing proposals to legislation which resulted in the amendment of the statute, in order to determine the 'mischief' which the statute was intended to remedy."

Having thus laid the foundation, he then referred to various paragraphs of the Report of the Federation of Malaya Constitutional Commission 1957, particularly paras. 161 and 162. The substance of his arguments, if I understand him aright, is that the Fundamental Rights provision constituted a guarantee and once having been so guaranteed, cannot be amended. Whilst conceding that these fundamental liberties are not absolute, he relies on the wording of Articles 7(1), 9(3) and 10 as support for the proposition that the power of Parliament to pass laws to restrict these freedoms must be circumscribed by or be subject to the provisos to be found in Part II only. For instance, Parliament could pass laws to punish the subject for acts or omissions, or to enhance punishment, but not retrospectively (Article 7(1)). The right of every citizen to move freely throughout the country and to reside in any part of it may be modified or be circumscribed by law only for the purposes set out in Articles 9(2) and 9(3). Again the right to freedom of speech guaranteed by Article 10(1)(a), to assemble peaceably by Article 10(1)(b) and to form associations by Article 10(1)(c) can only be restricted by laws passed in accordance with clauses 2(a), 2(b), 2(c) and (3) respectively.

Article 149 is relied upon as another buttress to his argument that the guarantees in Part II of the Constitution cannot be whittled away except under the stringent limitations imposed by the Constitution itself. Clause (1) thereof specifically permits such legislation against subversion to be passed "notwithstanding that it is inconsistent with any of the provisions, *inter alia*, of Articles 5, 9 or 10"; in other words, without specific provision on that behalf written into the Constitution, there can be no amendment made to Articles 5, 9 or 10 or the other Articles on Fundamental Liberties coming within Part II of the Constitution.

Whilst I would agree that the word "law" in Article 4 means all laws which Parliament is competent to pass, including federal laws passed to amend the Constitution, I fail to note any ambiguity when Articles 4 and 159 are read together.

Paragraph 80 of the Constitutional Commission Report, as one would expect, considered this important matter, and recommended that "the method of amending the Constitution should be neither so difficult as to produce frustration nor so easy as to weaken seriously the safeguards which the Constitution provides". Article 159(3) provides that (except for the provisions of lesser importance set out in clause 4) all amendments require the support of the votes of not less than 2/3 of the total number of members in each House.

Not only was amendment by a special majority in both Houses recommended by the drafters of the Constitution. One should also look at another provision of the Constitution to see what happens when the special requirements of Article 159 have been satisfied. Like any other Bill, a Constitution amending Bill would become law (under Article 66(5)) on being assented to by the Yang Dipertuan Agung, and as Senior Federal Counsel rightly points out, thenceforth becomes part of the Constitution, becomes integrated therein. The situation therefore cannot arise where it can ever be said to be inconsistent with the Constitution.

A more intriguing point raised was that there can be by implication parts of the Constitution which cannot be subject to any form of amendment whatsoever. In taking this line of reasoning, Raja Abdul Aziz appeared to be advancing the majority decision in an Indian Supreme Court decision of *Golaknath* v. *State of Punjab*[4] wherein 6 out of a special Bench of 11 judges had overruled previous decisions and taken the view that though there is no express exception from the ambit of Article 368, the Fundamental Rights included in Part III of the Indian Constitution cannot, by its very nature be subject to the process of amendment provided for in Article 368, and that if any of such rights is to be amended, a new constituent Assembly must be convened for making a new Constitution or for radically changing it. (See *Basu's* Commentary on the Constitution of India, 5th Edition, Vol. 5, page 495).

In the later decision of the Supreme Court *Kesavananda* v. *The State of Kerala*,[7] it was held *inter alia* at page 4, by a majority:

(i) The decision of the majority in Golaknath that the word "law" in Article 13(2) include amend-

ments to the Constitution and that the article operated as a limitation upon the power to amend the Constitution in Article 368 is erroneous and is over-ruled;

(ii) The power of amendment is plenary (full or complete). It includes within itself the power to add, alter or repeal the various articles of the Constitution, including those fundamental rights;

(iii) The power to amend does not include the power to alter the basic structure or frame-work of the Constitution so as to change its identity;

(iv) (Which on the face of it seems to be inconsistent with issue (iii): There are no inherent or implied limitations on the power of amendment under Article 368.

Only issues (i) and (ii) are relevant for the purposes of this appeal. I have referred to issues (iii) and (iv) because counsel for appellant has thought fit to broaden the scope of his arguments by reference to them.

It should be noted that the judges supporting the majority view are not the same in all four issues. That there should be such a diversity of views among the leading jurists in India show that what appears at first to be a straightforward matter of interpretation of the written word has become complicated by the doctrine of "basic structure or framework", those parts of the Constitution which are regarded by proponents of this doctrine as being of special sanctity.

Thus Sikri C.J. was (at page 164) "driven to the conclusion that the expression 'amendment of this Constitution' in Article 368 means any addition or change in any of the provisions of the Constitution within the broad contours of the Preamble and the Constitution to carry out the objectives in the Preamble and the Directive Principles. Applied to fundamental rights, it would mean that while fundamental rights cannot be abrogated reasonable abridgements of fundamental rights can be effected in the public interest." and at page 165 — "The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same." The basic structure, he said, consists of: (1) Supremacy of the Constitution; (2) Republican and Democratic form of Government; (3) Secular character of the Constitution; (4) separation of powers between the Legislature, the executive and the judiciary; and (5) Federal character of the Constitution.

The restriction upon the amending power of the Indian Parliament, according to this view arises from what is contained in the Preamble to the Indian Constitution.

Coming back to the issue before us, there is thus persuasive authority that whilst abrogation of the fundamental rights may not come within the ambit of our Article 159, reasonable abridgement of such rights are constitutional; that Parliament should decide when such amendment is necessary and it is not for this court to question the wisdom or need for such amendment.

I do not feel that the issue before this court would call for my view on whether there are indeed inherent or implied limitations to the power of amendment under Article 159, and must perforce confine myself to the issue before us viz. is the amendment to the fundamental right set out in Article 5 by Act A354/76 constitutional? Nor do I feel called upon to answer the broader issue of whether the power to amend includes the power to abrogate a fundamental right.

The power to amend would not, in this country, be restricted by anything set out in a Preamble for there is no Preamble to our Constitution. It seems to me to be clear that if there is to be any restriction to the right to amend any of the fundamental rights set out in Part II, such restriction would have been set out in one of the various clauses of Article 159 itself.

Another point raised by learned counsel for the appellant is the constitutional validity of this retrospective amendment. Counsel concedes that this is not a criminal matter so that there is no question of violating Article 7. His reference to the *Corpus Juris Secundum*, Vol. 16A, page 90, on Retrospective Laws does not further his cause, for even in the U.S., in the absence of express provision in the U.S. Constitution, no law is invalid merely because it is retrospective in operation (see page 94, section 415).

Mr. Lim has drawn our attention to a passage in *Bindra's* Interpretation of Statutes, 6th Ed., page 862, where under the heading "Prospective and retrospective operation" the following excerpt is relevant:

> "Constitutional provisions, like statutes, always operate prospectively and not retrospectively unless words used ... clearly indicate that a retrospective intention is intended. ...
>
> But an express intention that a constitution shall operate retrospectively will be enforced. Nor will a retrospective intention clearly manifest be avoided by consideration of inconvenience or hardship."

The effect of this amendment to Article 5 is to deprive the appellant of the protection afforded to him by the ruling of this court in *Assa Singh's case*, that he cannot sue for damages for what would otherwise be unlawful detention for the period ending November 29, 1972, since it is clear that this amendment is constitutionally valid.

This appeal in substance questions the validity of a law made by Parliament, in the words of Article 4(3) of the Constitution, "on the ground that it makes provision with respect to any matter with respect to which Parliament ... has no power to make laws ..." What Raja Abdul Aziz says amounts to this: Parliament cannot amend any of the Fundamental Liberties Articles beyond what is expressly permitted by Part II itself. I should therefore treat this appeal as a proceeding for a declaration such as is envisaged in Article 4(3) and I declare that the amendment to Article 5(4) by Act A354/76 is valid.

I would therefore dismiss the appeal. No order as to costs.

Appeal dismissed.

Solicitors: *Rithauddeen & Aziz.*